

Sir Alan Moses Speech to the Media Lawyers Resource Centre Conference Tuesday 29 September 2015

As I wander, both metaphorically and in reality up and down Fleet Street, the common and polite question from friends, acquaintances and former colleagues is, "how is it going?" And the truthful answer is – that it all depends what you mean by "going". What is success in the world of press regulation? And the bane of anniversary is, all the more so in the age of the audit, that people expect to be able to put a tick or a cross. A Gallic shrug and advice to wait and see is rarely acceptable and never makes a good story. And the many and opposing responses you would get to that question demonstrates and reinforces an inescapable difficulty.

Some people, or at least those people who interest themselves in this subject, believe the waters are charted – how wrong they are. The marker buoys are all over the place and there are no lighthouses – at least none that shed any useful light. The reason for this is that there is so wide and conflicting a view as to what press regulation is and what it should be; even when people use the same terminology, they mean different things. What does freedom of expression mean? Certainly, it means very different things according to your taste, prejudice and political persuasion. In short it may all depend on what you want to read.

This is because people want so many different things from their press. The press want to express themselves – wildly, crudely and with bias – tell an interesting story which readers will want to read, anticipating and creating the prejudices which they believe either their readers will share or which they hope they will share. And as for the public, they will assert that they want to be informed by a reliable source – but they too want their preconceptions to be reinforced, and above all, to slake their thirst for instant entertainment. Caught in between are those who suffer as a result of inaccuracy, distortion, bullying and cruelty; who need protection and who, without such protection, have no voice.

IPSO's objective is to provide to the public independent and effective regulation; a system whereby breaches of the Editors' Code are publicly corrected and condemned in terms dictated by IPSO and in those parts of the paper or in that place on the web dictated by IPSO. Its purpose is to compel correction, condemn breaches, and, if they are serious and deliberate, to punish them and to monitor and review their behaviour. How should it, how can it achieve such objectives?

Even if you adopt as gospel the word of the blessed Brian, the failures of cartographers to map out a system for measuring the success of attempts to regulate the press for centuries should cause no surprise. Indeed, it is the failure of historical perspective which should cause the greater astonishment. Brian recorded in his report the failure – despite reviews reports and commissions – to devise a successful system for controlling regulating or even managing the press since 1949. This seems to me remarkable only for the absence of reference to centuries gone by. Each century

records the anger, the scorn, and the fear of journalists and journalism which has remained a constant theme ever since licensing was abandoned in about 1640.

You will remember that the Leveson solution was to leave it to the press to create a new self-regulatory body – but to provide the public with assurance that the basic requirements of independence and effectiveness were met, and continued to be met, by providing for an independent process of recognition through Ofcom. Integral to the proposal was the provision of an incentive to join such a regulator in relation to civil costs of litigation in defamation privacy and other media claims. Failure to belong to a recognised regulator could lead to a court depriving a successful publication of its costs, under what is now Section 34 of the Crime and Courts Act 2013, to come into force in November of this year.

The failure to achieve an easy solution lay only partly in the rejection by Parliament of a wholesale adoption of Leveson's recommendations. Once his suggestion that Ofcom should provide the process for recognition of a new self-regulatory body was dismissed, it became necessary to devise an alternative scheme for recognition – hence the idea of a Charter was conceived.

Only those with an almost obsessive interest in the subject of press regulation and those who participate in media studies would welcome an account of the failure of any of the press (including those newspapers who did not sign up to IPSO) to support the idea of the Charter or to show any enthusiasm for signing up to a regulatory body which would seek recognition by the Charter Recognition Panel. The point I wish to underline is that the whole system advised by Leveson depended upon the agreement of the press to be regulated under enforceable contracts. It depended on submission and acquiescence – after all that was the whole purpose of the incentives. Absent the fear of adverse costs, (despite success), it was thought there would be no incentive to join a recognised regulator.

The proposals, made now nearly three years ago, built upon an understanding that successful self-regulation depends upon those who voluntarily submit to it accepting that it is in their own interests to be regulated; that their own interests require protection against a perceived threat by setting up a process of regulation. The creation of a regulatory body, IPSO, was the product of the press's belief at the time of Leveson and thereafter, that it was in their own interests to establish such a body. No wonder in the context of the outrage and disgust at their behaviour at the time, although it is idle to say that the cruel and criminal behaviour of some should be laid at the door of all.

It is important to stress that the press's belief as to what was in their own best interests was not the same belief as that held by others. It did not coincide with what Leveson advised was necessary for the protection of the public from further abuse. Still less with those who had suffered the appalling abuses described in his report (Hacked Off and their supporters). It is hardly surprising that the judgement of the powerful as to what is in their self-interest will rarely coincide with what those who fear that power assess to be necessary for their protection. The press has not hitherto believed that it is in their interest to belong to a regulator assessed by a body appointed to administer the Charter requirements for recognition, and the vituperation and the anger which that failure has engendered is hardly likely to persuade them to do so.

You above all, as advocates in a field of law so susceptible to the arts of persuasion, understand that aggressive abuse usually meets with an equal and opposite reaction. If the purpose is to

persuade the press that it is in their own interests to adopt a system of recognition under the Charter, then the language and approach of those most vocal in their anger as to what has happened after Leveson is only likely to have a contrary effect. This is hardly the most powerful advocacy. If it is intended to persuade rather than fuel the flames of those already committed to see the destruction of IPSO: *"They don't want fairness, they don't want change. No catalogue of the wrongdoing they have overseen would be long enough to shame them. They want business as usual, so they want IPSO"* (Tom Watson MP to an annual meeting of Hacked Off).

I started as the first chairman of IPSO by attempting to listen and learn from those who had suffered press abuse. I was told that as I had joined a fake or sham organisation controlled by the vested interests of the press, my expressions of sympathy were unwelcome. In subsequent talks describing what IPSO was doing and hoped to do in the future, loyal to their view, I omitted passages which described my sympathy and understanding of their disappointment and anger. It goes without saying that I was then criticised for failing to consider the interests of victims and showing no sympathy for those who sought protection.

IPSO, the first ever regulator created by the first ever contractual agreement of the vast majority of the press, cannot be expected – and perhaps should not be expected – to establish some measurable criteria of success, because to all those interested, to all those concerned, success will mean very different things. Few can be expected to agree on what regulation should achieve – the targets shift according to who is taking aim – but success in all regulation (particularly voluntary regulation) depends on a set of properly defined objectives. In such circumstances, the Professor of Law at Hull Michael Feintuck suggests, substantive values and principles are essential to effective regulation. How else is one to know what it is designed to achieve? How else is one to know what the regulator should look for; where to concentrate its resources; identify the risks; and how else to judge whether regulation is working or not? Above all, Feintuck underlines, a vague objective couched in general terms is a fool's errand and dooms regulation to failure.

You might have thought that there should be no difficulty in identifying the objective – to modify the behaviour of those portions of the press who have indulged in abuse, intrusion, distortion and lies – the cruelty and brutality which led to the Leveson Inquiry. What we are really after is *modification* of behaviour for the protection of the public and how best it is to be achieved. Yet if the public exhibits a traditional but persistent ambivalence, the objective becomes more difficult to identify. Small wonder then, that there is no common understanding as to what the essential objectives of press regulation are or ought to be. Such difficulty in resolving the fundamental conflict between freedom of expression – the right the press invoke to be free of control – and a system of regulation which seeks to exercise a measure of restraint, to impose a set of rules to control conduct.

But what is it all for? At its heart the purpose of regulation is to alter – to modify the behaviour of the regulated – when that behaviour is perceived to be damaging to those affected by it. In the case of an industry which causes pollution, the damage is easy to identify and the type of behaviour comparatively easy to monitor (unless of course the pollutant cheats). But what is damaging behaviour in the case of the press? To many, the bias and prejudice on which circulation relies is cruel and bullying. But how do you induce balance, taste and moderation (if that is what you want to be demonstrated) in the press you read? Do you? Those who want balance and taste are easily matched (and the press would say vastly outnumbered) by those who want to be entertained, for whom freedom of the press is a principle which confers the right

to be prurient. The difficulty lies in the uncomfortable reality that the public appears to abhor the methods used but approves of the outcome. Intrusion is reviled unless it leads to the exposure of corruption or, even better, some sexual wandering by the wayside. How do you establish a coherent and effective system of regulation which seeks to modify and control the processes of journalism when so often the outcome of a reprobate process is met with approbation and applause? Does anyone care about lies and distortion spread, even before a man is charged, if he is later found guilty? Does anyone care about illegal or unjustified subterfuge if it exposes wrongdoing?

Onora O'Neill sought to solve this problem in her Reuter's Memorial Lecture of 2011 by arguing that that regulation of the press should be all about controlling media process and not media content. (Rather in the same way, I suppose, as they used to say that judicial review was a review of the way a decision was reached rather than a review of that decision). There are important provisions about process in the Editors' Code – about subterfuge, and harassment for example – but the problem lies in the defence to challenges of such processes. A publication may invoke the public interest to justify a process which would otherwise be in breach of the Code, but it must be able to demonstrate that the editor had reason to believe it was in the public interest at the time of the decision to embark on the impugned process. If there was no basis for such a belief *at the time*, the publication cannot rely upon the fact that it resulted in a story which it was plainly in the public interest to publish. But what has been achieved in such a ruling? The PCC condemned the subterfuge used by those posing as Vince Cable's constituents, but did it not rightly lead to his rejection as a judge of the Murdoch acquisition of BSkyB? The provisions relating to illegal or unjustified subterfuge do have an important effect on publications – requiring them to think carefully and have reasoned justification before they embark on such a process. It does make editors pause and think – but you might be forgiven for at least wondering whether anyone cares about illegal or unjustified subterfuge which *does* expose wrongdoing.

So absent any clearly defined ultimate objective, what is effective press regulation and how is it to be judged? It is worth contrasting this absence of a common objective with the regulation of the professions. Regulation of a professional service illustrates the importance of a common objective, accepted by the regulator and the public. Regulation of the professions, medicine or the law, for example, satisfies the needs both of the regulated and those who depend on their professional skill and judgement. From the point of view of the regulated professional the regulator acts as a gateway, preventing (at least in theory) the shyster and the snake-oil salesman from entry, and with the ability to expel those who have revealed such characteristics in their practice. Regulation enhances the reputation of the professional in restricting entry to those who are qualified, disqualifying those who have shown themselves not to be worthy of the name of barrister, solicitor or physician. The patient or client who seeks their professional services has no means of knowing whose abilities are most appropriate to their needs or who is best qualified. Regulation provides protection. The aims and purposes are clear: a reliable skilled service, in which (at least in theory) the desire to deploy professional skill for the service of the weak and needy is as strong a motive as prosperity. Self-regulatory measures are thus in the interests of the professional. The regulatory measures they impose reflect the collective *expertise of the members as how to meet the risks and problems they foresee* both for their profession and for their public. If regulation preserves and *reinforces the gateway*, self-regulation is easier where it operates through the mechanism of licensing – where the cost of being allowed to enter the market is compliance with a set of standards commonly accepted to be necessary to protect the public.

Press regulation is not regulation of a profession: however much the Editors' Code may speak of raising professional standards; however fine and proud some journalists undoubtedly are; it is inescapable, if trite, to observe that journalism is not a profession in a regulatory sense. You cannot be admitted or expelled by a regulator, however grievous your behaviour. There is no statute or regulation which provides that you may not call yourself a journalist unless you comply with the entry standards imposed by a regulator approved by statute. Regulation of the professions poses no problem of legitimacy and fewer problems of the accountability on which legitimacy is dependant. Because it exists in a statutory framework, it derives its authority from the authority of the state. And the absence of a statutory framework, which no-one is advocating, leads inevitably either to no regulation at all or a system entirely dependent on the press's willingness and agreement to subscribe, with or without an incentive to do so. There is, in reality, no middle way.

My only concern is to preside over an organisation that in seeking to protect the public from abuse. In seeking to police and enforce a code of standards to which the press has signed up, I (and that organisation) make decisions and act independently free from the control of those who decided that it *was* in their own interest to create such a body. My belief is that in its first year IPSO has begun to fulfil that intention. To those whom IPSO seeks to protect from abuse and breaches of the Code, comfort or some comfort, is provided by our power of adjudication and remedy. For the first time ever, a regulator has a legally enforceable power to rule on breaches of the Editors' Code and compel a publication to publish the correction in the terms IPSO dictates and in the place it dictates and it has been doing this for the past year. There are 85 publishers with 1503 printed publications and 1605 online publications who have agreed to come under our jurisdiction – most with wholly different interests, many with deeply fought rival commercial interests – who have for the first time signed an agreement to be bound by our decisions and to be monitored by a regulator.

My experience is of course in that distinguished court of three, the Court of Appeal, and no former colleague should begin to criticise the conscientious work and analysis, the pithy and decisive judgments speedily delivered by former colleagues. But at least that experience places me in a formidable position to compare the conduct of that court with that of my current colleagues: the staff of 20, the Complaints Committee of 12, and the Board of 12.

Each week that Committee consider complaints, give rulings, and meet once a month to reach decisions which are published. Fine judgements have to be and are reached. May I pick some examples? In Sturgeon's complaint against the Telegraph's report of a memo recording that said she had said to the French Ambassador that she wanted Cameron to win the election. IPSO required the existence of our adverse adjudication to be published on the front page and the full adjudication against the newspaper to be published in IPSO's words on the second page. The Guardian described this decision as "scrupulous in attacking the reporting and not the content of the memo". The First Minister had never been contacted and the report failed to make clear that the authors of the memo had no first-hand or even second-hand knowledge of what she in fact had said. In Portes' complaint against the Times on its front page headline Labour's £1000 tax on families, the Times apologised and corrected, but IPSO ruled that the correction was inadequate and dictated a reference not only to the correction but also the IPSO ruling on the front page.

These are but two of the 463 complaints considered. The rules of procedure require complaints which come to IPSO to be monitored so that those which could not in any circumstances be

regarded as a breach, may be filtered. Then it is referred to the publication concerned to see whether the complaint can be resolved within a short time frame (a maximum of 28 days). Often a speedy correction is able to be made providing redress, whereas lengthy disputes serve only to underline and exacerbate the hurt felt by the aggrieved. 169 complaints were resolved between complainant and publication in this way.

Where that does not take place, the complaint returns to IPSO, which has successfully mediated 48 complaints, leaving the Complaints Committee to uphold 48 complaints and not uphold 198. Mediation is a powerful means of providing a remedy. When recently a complaint was made about the Mail on Sunday's headline, "Welcome to the East End: Muslim gang slash tyres of immigration-raid van before officers showered with eggs from high-rise", the work of IPSO quickly led to the Mail on Sunday's amendment of its headline, a change of story and an apology pointing out that the youth's religion was unclear and irrelevant.

We also have a much valued private advisory service, warning the press of those who do not wish to be approached, which is invoked regularly and successfully to protect the public from approaches that are unwelcome. We give pre-publication advice to newspapers.

I doubt whether one can measure success of these actions by opinion polling. We assert very substantial support, but if you ask a 143 word question designed to generate opposite, you will get an equal and opposite effect. So I'm not sure swapping polling results benefits the public. Where else are they to look for help and assistance, other than the only regulator who is regulating?

I mention these examples and give these figures for the purpose only of demonstrating that whilst the criticism remains vociferous (from time to time noisy) but some might think increasingly arid, IPSO is actually getting on with providing a service to the public of independent regulation. It is not the regulation the critics think the public ought to have, it is not what Leveson envisaged, but it is, I believe, undoubtedly a service, undoubtedly regulation and undoubtedly independent.

No-one tells us how we should reach our decisions or what those decisions should be. We recognise that the resolution of complaints is only part of the work of a regulator: regulation requires monitoring, appraisal and sanction. We now have a Standards function to run these processes. It should be observed that we have called for the annual statements of breaches of the Editors' Code for 2014, covering the period between September and December – and have received these from all the nationals, the largest magazine companies, and local or regional publishers. Work has started in assessing and monitoring those statements and we will identify points of concern and prepare for publication of these. This is the first time any such reporting has taken place and we will deploy the lessons learnt from those reports when it comes to the next round of reporting for the full year of 2015.

So this is no paper exercise. It is independent regulation in action. But that is not to say that elsewhere paper exercises do not take place. The Recognition Panel was founded under Royal Charter to recognise regulators so as to reassure the public that the basic requirements of independence and effectiveness were met and continue to be met. The panel that was founded and funded with £3 million, conducted a series of consultations around the country recognising that it needed to clarify certain criteria identified in the Charter. The surprising conclusion, however, is that it is prepared to recognise a regulatory body that does not regulate anyone: that

has no funds from those it regulates and no evidence of any ability in practice to act as an independent regulator. Following no doubt, the respectable precedent of the Ministry of Health's endorsement of King Edward's Hospital in *Yes Prime Minister*, notwithstanding its absence of a single patient. And thus whereas the Recognition Panel had proposed to look at evidence of operations, once Hacked Off and Impress objected that they would never attract anyone if they were not recognised. *When consultees such as the Guardian suggested that there should be evidence of unsustainable operation...and whilst Leveson pointed out that an effective regulator must have a sustainable operation and a sufficient core of members, the recognition panel rejected the need for any such thing commenting in imperious tones applications will be considered in relation to the circumstances that prevail at the point the regulator applies for recognition. We do not propose to comment further on what are currently theoretical scenarios when it comes to potential applicants.* Exactly.

Oh well, if you have to justify £3 million you've got to find someone to recognise. I dwell on this, not for the purpose of seeking to give a pale imitation of the scorn and derision of the efforts we make in actually providing a service, but to give your noble association some cause for optimism in the future. I foresee fruitful grounds for litigation as challenges are made to the lawfulness of any attempt to rely upon so baroque or even rococo process of recognition to trigger the cost shifting stick designed to encourage the press to join a regulator which will seek recognition. There's plenty of work there for you all.